In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 336

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

v.

JACKSONVILLE PAPER COMPANY, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

RECORD PRESS, INC., ST. AUGUSTINE, FLA.

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STATEMENT

In addition to the statement of the case made by petitioner, we desire to point out to the Court that merchandise stated in petitioner's brief to be "clearly earmarked for particular customers at the time they are ordered from the extrastate suppliers" constitutes an entirely inconsequential amount and, as pointed out by one of the witnesses (R 431, 441) these orders are handled more as an accommodation to customers than as a part of the usual business. For instance, the quantity of merchandise shipped direct from out-of-state suppliers to customers is about one-half of one per cent. of the total volume (R 383) and these orders are handled by the manager direct through the Jacksonville office, which latter is admittedly engaged in interstate commerce and its activities are not involved in this proceeding. Merchandise specially ordered for particular customers likewise is a very small percentage of the total number of orders (R 431). These special orders placed for particular customers, including orders that are printed with the name of the customer, amount to only about 1/40th of one per cent. (R 383-384).

The shipments for the Record Press particularly mentioned in petitioner's brief, are received but once every two or three months (R 470, 613). Also, orders for the Fruit Growers Press were placed only about once a year (R 618). The special label paper referred to in Note 6, page 7 of petitioner's brief consisted of one order only (R 362) and the ice cream cups for Poinsetta Dairy were usually carried in stock and regularly sold to other customers (R 393).

In other words, while the respondent, on occasion as required in connection with its business, handled these special items, its business as a whole was that usually and ordinarily conducted by a wholesale house, which carries in stock the goods usually required by its customers, and fills orders from its warehouse as and when such orders are received.

At page 18 of petitioner's brief, in note 16, counsel comments that respondent acts as exclusive distributing agent for various extrastate manufacturers of particular products. That is true only in the sense that Jacksonville Paper Company is the only distributor to whom such a manufacturer sells merchandise in this territory. However, this merchandise is purchased and paid for by Jacksonville Paper Company and sold to whom and on such conditions as it sees fit. The so-called agency, therefore, is not an agency in the technical sense (R 412, 440).

ARGUMENT

The broad question which appears from the assignment of errors at page 9 of petitioner's brief is whether or not the employees of the respondent as a group come within the coverage of the Act, because, admittedly, a large proportion of the merchandise handled by the respondent at its branches comes from without the State in which the branch is located. Differently stated, the question presented for decision by this Court is:

Does the mere fact of receipt of mechandise from without the State place under the coverage of the Act all of the employees of a wholesaler who places the merchandise in his warehouse and then sells it to local customers as and when orders for such merchandise are received?

We think it must be admitted that the Administrator throughout has attempted to give the broadest possible scope to the coverage of the Act; yet even he had some doubt that the principle he is now seeking to have adopted by the Court is a proper one. In Interpretative Bulletin No. 5, issued December, 1938, speaking of employees of a wholesaler making sales within the State in which his place of business is located, he said:

> "It is possible that a Court may draw a distinction between employees engaged in connection with the sale of goods in the original package and employees engaged in connection with the sale of goods after the package has been broken. More likely, however, the Courts will hold that employees employed in connection with the wholesale sale of goods brought in from outside the State are engaged in the stream of commerce and entitled to the benefits of the Act, whether or not the goods are sold in the original packages."

The slight doubt so expressed by the Administrator has been fully justified by the subsequent decision of every court to whom the question has been presented,—correctly so, if the long line of decisions dealing with the principles of inter as distinguished from intrastate commerce are to be given the weight which the reasoning and logic of these decisions commands.

We do not deal here with the power of Congress to regulate those affairs which, as it is so well expressed by this Court, in insolation are merely local, for, admittedly, Congress has not exercised that power to the full extent justified under the Commerce clause of the Constitution. We need only to refer to the opinion of Mr. Justice Frankfurter in *Kirschbaum v. Walling*, decided June 1, 1942, ... *U. S.* ......, *86 L. Ed. 1055*, i. e.

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied."

In that decision the legislative history of the Act is considered, and it is pointed out that the history of Congressional legislation regulating not only interstate commerce as such, but also activities intertwined with it, justifies the generalization that those charged with the duty of regulating are reasonably explicit and do not intrust its attainment to that

retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

See also *Federal Trade Commission v. Bunte Bros. 312 U. S. 349; 35 L. Ed. 881; Jewel Tea Company v. Williams, 118 Fed. (2d) 202; Walling v. Goldblatt Bros., 128 Fed. (2d) 778.*

When we bear in mind, therefore, that the Act is limited in application to the activities of the employee, rather than the scope of the business of the employer, coupled with the fact that the employee must be "engaged in commerce or in the production of goods for commerce" and not merely in activities affecting commerce, it is clear that the broad application of the Act contended for by the Administrator exceeds the expressed intention of Congress and seeks to have the Court do the very thing which it said in the Kirschbaum case "deserves the stigma of judicial legislation".

If there is one thing which can be deduced from the decisions hereinafter referred to, it is that the interstate transportation of goods will be deemed to be at an end when the goods reach the point of original destination, unless there was an intention at the time of the inception of the movement that there would be further transit beyond the State or that the specific goods are, at the inception of the movement, destined for a particular consignee or purchaser within the State. The mere expectation that the goods will be sold in the course of the business of the original consignee to some buyer, then unknown, who will in all likelihood present himself in the course of business is not sufficient to impress upon the merchandise an interstate character until it is delivered to a purchaser whose identity is not known at the inception of the movement from without the State.

While counsel for the petitioner argues that railroad and tax cases should not be considered, we differ with that contention, for it is the character of the commerce which was considered by the Courts in reaching a decision in these cases, and that character is essentially the same whether the question is one of the application of intra- or interstate rates or the power of the State to impose taxes. We refer briefly to *Givens v. Director General of Railroads, 92 ICC 63*, holding that where

neither the consignee nor the consignor knew what the disposition of the goods would be, at the time they were billed from Pennsylvania to Louisiana, the fact that they were shipped shortly after arrival at the point of original destination to other points in Louisiana did not impress the subsequent movement with an interstate character.

This Court reached a like conclusion in *C. M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334*. There shipments of coal from without the State in carload lots were held at the point of original destination until the consignee could effect a sale thereof. Thereupon, bills of lading were tendered to another railway company for further transportation. It was held that the reshipment to other points within the State was not a continuation of the original movement. The question in that case was whether or not the State Railroad Commission had jurisdiction to compel re-shipment of the coal in the cars in which it was originally received. Mr. Justice Hughes delivered the opinion of the Court and found that the State Railroad Commission correctly held that the certainty in regard to the shipment of coal ended at Davenport (the point of original destination) and that the point where the same was to be shipped beyond Davenport, if at all, was determined after arrival of the coal at Davenport.

In *American Steel & Wire Co. v. Speed, 192 U. S. 500*, the Court was called upon to adjudicate the constitutionality of a tax imposed by the State of Tennessee upon merchants. It was contended that this tax was a burden upon interstate commerce, that the American Steel & Wire Company was a foreign corporation and had selected Memphis merely as the distributing point at which it arranged with a local transfer company to take charge of products consigned to the Steel Company, store them in a warehouse there, assort them and make deliveries to the persons to whom the goods were sold by the Steel Company. The Court held that when goods are brought in original packages from another State, after they have arrived at their destination, are at rest within the State and are enjoying the protection which the laws of the State afford, they are subject to State taxation although they are subsequently to be delivered in the same packages through the storage company to purchasers in various states.

That case was followed by *General Oil Co. v. Crain*, 209 *U. S. 211*. That likewise involved a question of taxation. The Court said at page 231 that the oil

> "was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there, —the maintenance of the means of storage, of putting it in and taking it from storage."

and hence that the property was no longer in interstate commerce.

These cases are illustrative of the point, but the argument of the Administrator that the interstate commerce does not end until delivery to the ultimate purchaser is most clearly refuted by the opinion of this Court in the comparatively recent case of *Atlantic Coast Line Railroad Co. v. Standard Oil Co.* 275 *U. S. 257*. It appears in that case that the Standard Oil Company maintained large storage tanks at Port Tampa and Jacksonville, in the State of Florida, for the reception of oil shipped from Louisiana and from Mexico, under yearly contracts, for delivery monthly as needed. In turn, the oil is sold to customers in the State of Florida under contract, approximately 95% being so contracted for before the oil has been shipped from the point of origin. The question for decision was whether the subsequent movement from the port to destination at interior points in the State of Florida was intra- or interstate commerce for rate purposes. The Court pointed out at page 265 of the opinion that at the time the shipment of the fuel oil is made from the point of origin, the consignee cannot say where any particular cargo of it, or any part thereof, will go after it had been pumped into the storage tank, to whom it will go or when it will be shipped; that at the time of shipment from the point of origin the only destinations which can be given are Port Tampa and Jacksonville respectively. At page 267, the Court said:

> "It seems very clear to us, on a broad view of the facts, that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagon to customers, is all intrastate commerce."

While it is true that this, likewise, is a railroad rate case, the opinion of the Court has been cited in many cases involving an entirely different aspect of the question, including the following:

Schechter Poultry Corp. v. U. S., 295 U. S. 495,
Jewel Tea Co. v. Williams, 118 F. (2d) 202,
Walling v. Goldblatt Bros., 128 Fed. (2d) 778,
Gerdert v. Certified Poultry & Egg Co., Inc., 38 F. S. 964,
McDaniel, et. al. v. Clarin, 128 Pac. (2) 821.

It was also referred to with approval by the Maine Supreme Judicial Court in the opinion in *Higgins v. Carr Bros. Co.*, 25 Atl. (2d) 214, now before this Honorable Court for review.

In the *Schechter* case, supra, this Honorable Court used the following language:

> "The mere fact that there may be a constant flow of commodities *into* a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."

Here, as there, the merchandise received by Jacksonville Paper Company, has come to a permanent rest within the State. It is not held, used, or sold by the respondent in relation to any other transaction in interstate commerce, and is not destined for transportation to other states, nor was it so transported. It is admitted that in the branches here involved only an intrastate business was done (petitioner's brief, page 5). Therefore, as pointed out by this Court, such decisions as *Stafford v. Wallace*, 258 U. S. 495; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Swift & Co. v. United States*, 196 U. S. 375; *Currin v. Wallace*, 306 U. S. 1, all of which deal with entirely different factual and statutory situations, are of no help in arriving at a conclusion. In the case at bar,

the goods, once they reach the warehouse of the respondent at the different branches, are not intended for further movement beyond the State, nor is the warehouse a mere facility in the course of interstate commerce, such as the stockyard in *Stafford v. Wallace*, 258 U. S. 497, which Mr. Chief Justice Taft denominated as a mere throat through which the current of commerce flows in that practical continuity of movement commented upon by this Court in the *Schechter* case.

Every appellate court which has been called upon to pass upon this question in connection with the application of the Fair Labor Standards Act, has adhered to the "state of rest" doctrine, contrary to the position taken by the Administrator in this case, and we call attention to the following decisions which squarely support the principles contended for by the respondent:

Jewel Tea Co. v. Williams, 118 F. (2d) 202

This was the earliest expression of a Circuit Court of Appeals in connection with the Fair Labor Standards Act. The Court in that case pointed out that Congress did not extend the coverage of the Act to employment that merely affects interstate commerce, citing *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 348, and holding:

> "Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers without a specific order therefor from the customer, and the goods come to rest in a warehouse, interstate commerce ceases when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer."

This was followed by a series of decisions of the Fifth Circuit Court of Appeals in *Jax Beer Co. v. Redfern*, 124 F. (2d) 172; *Swift & Co. v. Wilkerson*, 124 F. (2d) 176 and the case at bar, and by *Walling, Administrator, v. Goldblatt Bros. Inc.*, 128 F. (2d) 778, now before this Court on petition for writ of certiorari (No. 418), so that we have the unanimous view of three different Circuit Courts of Appeal, i. e., in the order named, the Tenth, Fifth and Seventh Circuits, all holding that under circumstances such as involved here the business of the wholesaler is purely local and without the Act when merchandise received from beyond the State is placed in the warehouse of

the wholesaler for subsequent distribution to customers in the ordinary course of business.

A like conclusion was reached by the Supreme Court of Tennessee in *Brown v. Bailey, 147 S. W. (2d) 165*, applying the "state of rest" doctrine to a wholesale liquor distributor, by the Supreme Judicial Court of the State of Maine in *Higgins v. Carr Bros. Co., 25 Atl. (2d) 214*, now before this Court (No. 97), and by the Appellate Court for the Second District of California in *McDaniel, et. al. v. Clavin*, decided August 28, 1942, *128 Pac. (2) 821*, the latter being a claim for overtime on the theory that frozen poultry received in interstate commerce for sale to the local trade was under the Act. The Court, however, said:

> "The rule applicable here may be stated as follows: When merchandise has been imported into California from other states by a merchant to meet the anticipated demands of his customers without specific orders therefor from such customers, and comes to rest in a warehouse in this state, it is no longer in interstate commerce after coming to rest."

The latest expressions from the highest courts of a State are *Serio v. Dee Cigar & Candy Co., Inc.*, in the Supreme Court of Alabama, decided October 8, 1942, *6 Labor Cases 61,254*, and *Bock v. Hoffman* in the Supreme Court of Colorado, decided October 19, 1942, *6 Labor Cases 61,275*, the former dealing with an employee of a wholesale tobacco dealer whose duties were solely concerned with intrastate distribution of goods received in the main from outside of the state, and the latter with the employee of a wholesale meat dealer selling meat brought in from other states and sold within the state.

Numerous decisions of the United States District Court have adopted this rule and we call attention to the following:

Gerdert v. Certified Poultry & Egg Co., Inc., (S. D. Fla.) 38 F. Supp. 964.
Muldowney v. Seaberg Elevator Co., Inc., (E. D. N. Y.) 39 F. Supp. 275.
Rauhoff v. Gramling & Co., (E. D. Ark.) 42 Fed. Supp. 754.
Veazey Drug Co. v. Fleming, (W. D. of Okla.) 42 F. Supp. 689.
Porter v. Wilson & Co., Inc., (N. D. Tex.) 5 Labor Cases 60896.

The petitioner relies very strongly upon *Federal Trade Commission v. Pacific Paper Trade Association*, 273 U. S. 52. However, the facts in that case are entirely different from those in the case at bar in that the merchandise was shipped by out-of-state manufacturers pursuant to specific orders, first secured from the local retailers and the merchandise so ordered was earmarked for a particular purchaser. In the case of carload shipments, they were consigned direct to the purchaser, never coming into the possession of the wholesaler or jobber in the sense of passing through his warehouse. Less than carload shipments were received by the wholesaler simply for the purpose of making distribution to the ultimate consignee, who had previously ordered these specific goods before shipment was made. Therefore the test of continuity, i. e., knowledge at the inception of the movement of the ultimate destination of the goods is present. This is not the case here and therefore petitioner is forced to fall back upon a theory of anticipated demand which he says is in effect the same as the taking of orders for a known purchaser. However, the anticipated demand theory is not new and has been rejected in a number of decisions, notably *A. C. L. v. Standard Oil Co.*, supra. While not specifically mentioned in that case, the doctrine of anticipated demand was undoubtedly considered by the Court, as it appears from the opinion above quoted that 95% of the petroleum products so moving to the port were destined to interior points in the State of Florida pursuant to contracts made before the shipment left the out-of-state point.

Anticipated demand was expressly relied upon by the plaintiff in *Lipson v. Socony Vacuum Oil Co.*, 87 F. (2d) 265 in the Circuit Court of Appeals for the First Circuit. The action was one under the Clayton Act, and plaintiff contended that gasoline brought into the State in what he termed a continuous flow retained its interstate character until delivery to the storage tanks of the retailer, because the course of business of the distributor clearly indicated that such further movement would take place. Pointing out the fallacy of such reasoning, the Court said:

"While it is clear that the defendants must keep a supply on hand in their storage tanks to meet the fluctuations of demands of the retailer, *an anticipated*

> *demand* by retail customers is not sufficient to render shipments a transaction in the course of interstate commerce until delivered to the customer whenever a demand arises. The cases which hold an order or contract for goods which necessitates a shipment in interstate commerce, and that interstate commerce continues until delivered to the customer, do not apply to anticipated demands. We do not think the Supreme Court has gone so far as to hold that, to meet the anticipated demands of customers without a specific contract therefor, interstate commerce continues, until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer."

Indeed, it is common knowledge that every merchant, be he wholesaler or retailer, anticipates when he buys goods that he will be able to sell them, and that the sale when made will involve some additional transportation. Every merchant plans his purchases so as to meet the anticipated demands of his customers, but when he does not know, at the time the goods are ordered, when or to whom they will be sold, it would certainly be carrying the theory of "continuous flow" to an ultimate to hold that interstate commerce continues until delivery is made to the customer and if petitioner's contention is correct and interstate commerce does not cease until the ultimate consumption of the goods, there is no longer any such thing as intrastate commerce.

If the anticipated demand principle is correct, then the retailer likewise will be in interstate commerce, for it is no more consistent with logic to say that the wholesaler knows when he buys the goods that they will not permanently remain in his warehouse than it is to say that the retail merchant expects to dispose of them. That such expectation is not always realized is amply illustrated by the many business failures resulting from overstocking and from the accumulation of inventories due to the failure of the expected demand to materialize, whatever the reason for such failure might be. See Note 13, page 15 of Petitioner's brief.

The anticipated demand theory was also considered by the Circuit Court of Appeals in the *Jewel Tea Co.* case and the *Goldblatt* case, already referred to.

We have already discussed and distinguished *Federal Trade Commission v. Pacific State Paper Trade Association*, and we now consider the decision in *Binderup v. Pathe Exchange*, 263 U. S. 291. The shipment of film, which the Court there held to constitute interstate commerce, was made to the agent of the out-of-state shipper and the contract with the exhibitors, while made in Nebraska, expressly provided that it should be deemed to be made in New York and contemplated the shipment of the film from out of the state. The contract obliged the lessee to exhibit the pictures for specified periods only and provided for ultimate re-shipment by the lessee on advices to be given by the distributor. Here, again we have present the element of prior knowledge at the inception of the movement that the films will be re-shipped.

The decision of the Fifth Circuit Court of Appeals in *DeLoach v. Crowley's, Inc.*, 128 F. (2d) 378 also depends upon a different state of facts. The shipments there were milk, they were made by the New York concern to its Florida subsidiary and upon arrival were transferred in the original containers as quickly as possible and delivered to the defendant's customers. Furthermore, it was alleged that the plaintiffs were employed in unloading the products as they arrived from New York in Miami and re-loading them to the delivery trucks of the defendant. In other words it appears that the milk there never went into the warehouse of the defendant to await future orders, and there was an express allegation that the plaintiffs unloaded the interstate shipments and re-loaded them to the delivery trucks, showing an entire absence of the goods coming to rest. The decision was on motion to dismiss and the Court merely held that the petition ought not to have been dismissed on motion and that the question of whether plaintiffs were employed to a substantial extent in commerce under the Act is a question deserving trial. Furthermore, this opinion was delivered by the Court on the same day that the opinion in the case at bar was handed down, and hence cannot be said in any sense of the word to be inconsistent with the findings in the Jacksonville Paper Company case.

It is suggested by petitioner that the *Schechter* case cannot be considered as authority for the contention that interstate commerce ends upon delivery of the out-of-state shipments to

the respondent. We do not think the opinion is subject to such a construction, which is based upon a distinction drawn between the commission men, who make the sale of the live poultry, and the slaughter-house operators. The slaughter-house operators, however, are not the consumers. On the contrary, it appears from the opinion that the poultry is usually sold within twenty-four hours to retail poultry dealers and butchers, who, in turn, sell to the consumers. There is no distinction, therefore, between the position of the slaughter-house men in the *Schechter* case and the Jacksonville Paper Company in this case. Both of them are wholesalers. Both of them receive their merchandise from without the State and both of them in turn sell to the retailers and consumers within the State. If, as contended by petitioner, interstate transportation continues until delivery to the retailer, then the defendants in the *Schechter* case certainly were engaged in interstate commerce. That the Court did not so hold in that case establishes that it did not consider the interstate commerce as continuing to the point contended for by petitioner.

The same distinction is also drawn in *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156, in the Circuit Court of Appeals for the Second Circuit. The decision, arising under the Sherman Anti-Trust Act, points out that the receivers of poultry did not warehouse it or commingle it with local goods before disposing of it but were merely a conduit through which flowed daily streams of commerce from shippers to the market men. The Court did hold that interstate commerce ended upon the sale by the receivers to the market men, the latter being wholesalers, as pointed out in the *Schechter* decision.

The so-called receivers to whom the poultry was consigned from out-of-state points in the *Schechter* and *Greater New York Live Poultry Chamber of Commerce* cases, as pointed out in these decisions, performed a function very closely akin to that of the stockyards and similar transit facilities dealt with in *Stafford v. Wallace* and similar cases already referred to, in that the poultry is received by them for immediate sale either at the railroad terminal or at a public market and is never warehoused by them, whereas the slaughter-house operators there held not to be engaged in interstate commerce oc-

cupied a position quite similar to that of the ordinary wholesaler, although they disposed of this poultry to the retailers more quickly than is the case with a wholesaler of the type of Jacksonville Paper Company.

We come now to the argument that the rule contended for by the respondent would result in discrimination between large and small wholesalers in the State of destination. Such, however, is not the case for if a large wholesaler, who receives his goods from without the State, is not within the Act, so long as he sells locally, neither is the small wholesaler under similar conditions. The branches of respondent here involved also do a comparatively small business. The volume of sales for the calendar year 1940 at St. Petersburg, for instance, was only \$81,579.57, that at Orlando \$117,781.26 and that at West Palm Beach \$91,429.72 (R 699). Furthermore, the Act was primarily intended to benefit employees, to spread employment, and to prevent sub-standard labor conditions. Nothing is said in the Act about any purpose to equalize competitive conditions between employers, and certainly is this true as to employees, for one employee, by reason of the character of the work in which he is engaged, may come within the purview of the Act, and another employee doing substantially similar work of a local character, working on the same premises and for the same employer, would, under the decisions and the clear intent of Congress, be exempt from its benefits. Neither can it be said that the failure of Congress to adopt amendments which would expressly exempt wholesalers is any indication of an intent to place all wholesalers within the Act. Certain wholesalers, such as respondent at the Jacksonville and other branches not here involved, who ship their merchandise out of the State, are admittedly covered. It may well be that Congress did not desire to exempt those wholesalers who are engaged in interstate commerce and adhere to its purpose, clearly expressed in the Act, to let the occupation of the particular employee be the test of coverage. On the other hand, Congress did not adopt any amendments which would enlarge the limitation upon the scope of the Act by reason of its application only to employees engaged in interstate commerce and in the production of goods for interstate commerce by the use of broader language which would make the Act applicable to pursuits affecting interstate commerce.

Considerable space is devoted by petitioner in its brief to a discussion of the exceptional conditions regarding special orders, such as, for instance, the order of ice cream cups for Poinsetta Dairy, but as we have already pointed out in the statement of facts, those orders are the exception rather than the rule and inconsequential in amount, being handled more as an accommodation to customers than as a part of the usual business (R 431, 441). See *Goldberg v. Worman, (S. D. Fla.) 37 F. Supp. 778*, where District Judge Strum held that small shipments amounting to approximately 3% of the total volume of business made to customers in a neighboring state and distributed by them as an accommodation to their friends for consumption were not sufficient to place the employee under the Act. To paraphrase the language of petitioner's brief at page 28, the business is not run to satisfy such demand; its operations are founded upon the stable and recurring demands which make up its bulk.

CONCLUSION

We respectfully submit that the theory advanced by the Administrator, if upheld, would so enlarge the scope of interstate commerce, if carried to its logical conclusion, that no business, no matter how small and inconsequential, could thereafter be said to be purely local and in such event the negro washwoman so familiar to the South might reasonably be said to be engaged in interstate commerce because the soap and washing powder she employs in rendering her services comes from without the State. Indeed, we can conceive of no business, no matter how trivial, which under such an interpretation would not come within the purview of the Interstate Commerce Clause and certainly the "state of rest" doctrine would be expunged from the legal dictionary. That such is not the proper function of the Federal Government, and certainly was not intended by Congress in the enactment of the Fair Labor Standards Act, must be apparent. No court has yet gone to such an extent and in the late case of *National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1*, this Court re-affirmed that:

> "The authority of the federal government may not be pushed to such an extreme as to disregard the distinction which the commerce clause establishes be-

> tween commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

We respectfully submit that the decision of the Court below, limiting interstate commerce to the end of the journey as originally contemplated, i. e., the delivery to the wholesaler, should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 336.—October Term, 1942.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *vs.* Jacksonville Paper Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 18, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit brought by the Administrator to enjoin respondent from violating provisions of the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. § 201. Respondent is engaged in the wholesale business, distributing paper products and related articles. Its business covers a large area embraced within a number of states in the southeastern part of the country. The major portion of the products which it distributes comes from a large number of manufacturers and other suppliers located in other states and in foreign countries. Five of respondent's twelve branch houses deliver goods to customers in other states and it is not contended that the Act does not apply to delivery employees at those establishments. The sole issue here is whether the Act applies to employees at the seven other branch houses which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, do not ship or deliver any of it across state lines.

Some of this merchandise is shipped direct from the mills to respondent's customers. Some of it is purchased on special orders from customers, consigned to the branches, taken from the steamship or railroad terminal to the branches for checking, and then taken to the customer's place of business. The bulk of the merchandise, however, passes through the branch warehouses before delivery to customers. There is evidence that the customers constitute a fairly stable group and that their orders are recurrent as to the kind and amount of merchandise. Some of the items carried in stock are ordered only in anticipation of the needs of a particular

customer as determined by a contract or understanding with respondent. Frequently orders for stock items whose supply is exhausted are received. Respondent orders the merchandise and delivers it to the customer as soon as possible. Apparently many of these orders are treated as deliveries from stock in trade. Not all items listed in respondent's catalogue are carried in stock but are stocked at the mill. Orders for these are filled by respondent from the manufacturer or supplier. There is also some evidence to the general effect that the branch manager before placing his orders for stock items has a fair idea when and to whom the merchandise will be sold and is able to estimate with considerable precision the immediate needs of his customers even where they do not have contracts calling for future deliveries.

The District Court held that none of respondent's employees in the seven branch houses in question were subject to the Act. The Circuit Court of Appeals reversed. 128 F. 2d 395. (1) It held that employees who are engaged in the procurement or receipt of goods from other states are "engaged in commerce" within the meaning of § 6(a) and § 7(a) of the Act. (2) It also held that where respondent "takes an order" from a customer and fills it outside the state and the goods are shipped interstate "with the definite intention that those goods be carried at once to that customer and they are so carried, the whole movement is interstate" and the entire work of delivery to their final destination is an employment "in commerce". Those were the only types of transactions which the court held to be covered by the Act.

The Administrator contends in the first place that under the decision below any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status. In that connection it is pointed out that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient. The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouses is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would

result in too narrow a construction of the Act. It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.[1] There is no indication (apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. As in the case of an agency (cf. *De Loach* v. *Crowley's Inc.*, 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

Secondly, the Administrator contends that the decision below excludes from the category of goods "in commerce" certain types of transactions which are substantially of the same character as the prior orders which were included. Thus it is shown that there is a variety of items printed at the mill with the name of the customer. It is also established that there are deliveries of certain goods which are obtained from the manufacturer or supplier to meet the needs of specified customers. Among the latter are certain types of newsprint, paper, ice cream cups, and cottage cheese containers. The record reveals, however, that the goods in both of these two categories are ordered pursuant to a preexisting contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held were covered by the Act. We think they must be included.

[1] See for example the statement by Senator Borah speaking for the Senate conferees on the Conference Report, " . . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9170.

Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer "in commerce". But as we stated in *Kirschbaum Co. v. Walling*, 316 U. S. 517, 520-521, decisions dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the reach of this Act.

Finally, the Administrator contends that most of the customers form a fairly stable group, that their orders are recurrent as to the kind and amount of merchandise, and that the manager can estimate with considerable precision the needs of his trade. It is therefore urged that the business with these customers is "in commerce" within the meaning of the Act. Some of the instances to which we are referred are situations which we have discussed in connection with goods delivered pursuant to a prior order, contract, or understanding. For the reasons stated they must be included in the group of transactions held to be "in commerce". As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside. We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods "in commerce" within the meaning of the Act. It was said in *Swift & Co. v. United States*, 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." While that observation was made apropos of

the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is "in commerce" within the meaning of this Act. We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.

In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess., p. 5; 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9169. Moreover as we stated in *Kirschbaum Co.* v. *Walling*, *supra*, p. 522-523, Congress did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions "affecting commerce". But as we noted in the *Kirschbaum* case the Act did not go so far. It is urged, however, that a different result obtains in case of wholesalers. The argument is based on the fact that the Act excepts from § 6 and § 7 "any employee employed in a . . . local retailing capacity" (§ 13(a)(1)) and "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". § 13(a)(2). Since retailers are excluded by reason of these express provisions, it is thought that the inclusion of wholesalers should be implied. There is, however, no indication in the legislative history that but for the exemption of retailers it was thought that all movement of goods from manufacturers to wholesalers and on to retailers would be "in commerce" within the meaning of the Act, where the wholesalers and retailers were in the same state. It is quite clear that the exemption in § 13(a)(2) was added to eliminate those retailers located near the state lines and making some interstate sales. 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 7, pp. 7281-7282, 7436-7438.[2] And the exemp-

[2] And see Joint Hearings, Senate Committee on Education and Labor, House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, Pt. 1, p. 35.

tion for retailers contained in § 13(a)(1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included. *Id.* Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate. The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business along the lines we have indicated.

The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra,* p. 524. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations (*Kirschbaum Co.* v. *Walling, supra,* p. 523) the question of the Act's coverage depends on the special facts pertaining to the particular business. The Circuit Court of Appeals remanded the cause to the District Court so that new findings could be made and an appropriate decree be framed. Whether additional evidence must be taken on any phase of the case so that a decree may be drawn is a question for the District Court. We merely hold that the decision of the Circuit Court of Appeals as construed and modified by this opinion states the correct view of the law. As so modified, the judgment below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.